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87-1643

No.

In the
Supreme Court of the United States
October Term, 1987

EDWARD SPANGLER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Can evidence of good reputation in and of itself create a reasonable doubt of guilt in a criminal case?

2. Does a trial court have a duty to rule unambiguously on a requested instruction central to the defense's theory of the case?

PARTIES TO THE PROCEEDINGS BELOW

The caption of the case in this Court contains the names of all the parties to the instant Petition. However, the Court should note that the appeal of Anthony Mairone, Petitioner's co-defendant at trial, was consolidated with Petitioner's appeal in the Third Circuit.

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THE OPINION BELOW

The lower court's opinion is reproduced as Appendix A hereof, and is cited at 838 F.2d 85 (3rd Cir. 1988).

JURISDICTION OF THIS COURT

After declining to hear oral argument, the Third Circuit entered its Opinion and Judgment on January 29, 1988. A rehearing was denied on February 19, 1988. Jurisdiction of

this Honorable Court is invoked under 28 USC 1254(1) and Supreme Court Rule 20.4.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Federal Rule of Evidence 803(21) provides: "The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (23) Reputation as to character. Reputation of a person's character among associates or in a community."

At the time of trial, Federal Rule of Criminal Procedure 30 provided: *Instructions [Effective until Aug. 1, 1987.]* At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of hearing of the jury and, on request of any party, out of the presence of the jury."

The Fifth Amendment to the United States Constitution provides in pertinent part that "No person . . . shall be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the United States Constitution provides in pertinent part that "In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense."

STATEMENT OF THE CASE

Petitioner, a Philadelphia Police Lieutenant, was convicted by a jury of extortion, conspiracy to commit extortion, and aiding and abetting the crime of extortion, in violation of 18 U.S.C. 1951 (1982) and 18 U.S.C. 2. On July 29, 1987, the U.S. District Court for the Eastern District of Pennsylvania sentenced him to 14 concurrent terms of imprisonment for seven years each, plus five years probation, and Petitioner appealed.

The two primary issues on appeal arose from the following facts at trial.

Petitioner denied the charges against him from the witness stand and called seven character witnesses who testified that he had an excellent reputation in the community for honesty, integrity and being a law-abiding citizen.

Prior to settling the jury charge, Petitioner's counsel submitted a written request that the jury be charged as follows: "Evidence of good reputation in and of itself can create a reasonable doubt." No other instruction on the subject was discussed or considered.

At the Rule 30 conference, Petitioner's counsel asked the trial judge "Does the Court intend or will the Court be considering to give our ["standing alone"] character witness instruction?" to which the judge immediately responded "You will get the character witness instruction."

After defense counsel relied on the requested instruction in summation to the jury,[1] the trial judge gave a materially

[1]Counsel for Petitioner's co-defendant at trial, who jointly submitted the same instruction and coordinated closing arguments with Petitioner's counsel, told the jury during summation: "The Judge will tell you that we had to prove nothing. We did prove one thing, his reputation. And the reputation evidence in and of itself can create a reasonable doubt. That is enough in itself to create a reasonable doubt."

different character witness instruction indicating that evidence of good reputation in and of itself *cannot* create a reasonable doubt.[2] Petitioner's counsel promptly objected that this was in violation of Rule 30 and filed a post-trial motion for acquittal or new trial, which the trial judge denied, stating that the "standing alone" instruction was not the law.

The Third Circuit affirmed Petitioner's conviction, by attempting to harmonize its earlier decisions approving the "standing alone" language, and by asserting that the trial judge did not mislead Petitioner's counsel in ruling on his request for such a charge. In reaching this result, the Third Circuit made no reference to the underlying decisions of *this* Honorable Court or the myriad conflicting decisions of the other federal circuits.

REASONS FOR GRANTING THE WRIT

1. On the question of when, if ever, an accused is entitled to a "standing alone" reputation evidence instruction, there is a *clear conflict among the federal circuits*, traceable directly to the opinions of this Honorable Court.

Although every circuit that has considered the issue derives its position from *Edgington v. United States*, 164 U.S. 361

[2]After summations were concluded, the trial court instructed the jury as follows: "Now, you did hear some, some people call it character evidence, reputation evidence. You heard a number of character witnesses, each of whom, some of whom, let's put it that way, I think, stated their personal opinion, as well as the reputation of the defendant in the community for honesty and being a law abiding citizen and the law says you should consider such character evidence along with all the other evidence you heard in the case when making your determination as to whether the government has proved, beyond a reasonable doubt, that the defendant whose case you are then considering, committed the particular crime or crimes that are alleged in the indictment."

(1896), and *Michelson v. United States*, 335 U.S. 469 (1948), at least three different interpretations of those two cases have emerged: (1) that a "standing alone" instruction *should be given* whenever an accused offers reputation evidence[3]; (2) that such an instruction *may be necessary* in some such cases[4]; and (3) that such an instruction *is never appropriate*.[5]

Now the Third Circuit, in its opinion below, has added a fourth approach to the question: "We hold that so long as an instruction . . . is given, which calls the jury's attention to its duty to take character evidence into account with all of the other evidence in deciding whether the government has proved its charge beyond a reasonable doubt, the omission of the express "standing alone" language which was requested here is not an abuse of discretion . . . ." Op. at page 6.

2. Reputation evidence is sometimes the only evidence an accused offers in his defense, and the rules of evidence have long upheld an accused's right to offer such evidence. See Federal Rule of Evidence 803(21), recognizing the traditional

[3]*See*, for example, *United States v. Cramer*, 447 F.2d 210, 219 (2s Cir. 1971), *cert. denied* 404 U.S. 1024; *United States v. Minieri*,303 F.2d 550, 554-555 (2d Cir. 1962), *cert. denied* 371 U.S. 847; *United States v. Zane*, 495 F.2d 683, 698 (2d Cir. 1974), *cert. denied* 419 U.S. 895; *United States v. Darland*, 626 F.2d 1235, 1238 (5th Cir. 1980), *cert. denied* 454 U.S. 1157; *United States v. Hewitt*, 634 F.2d 277, 278-280 (5th Cir. 1981).

[4]*See*, for example, *United States v.McMurray*, 656 F.2d 540, 551 (10th Cir. 1971), *reversed on other grounds* at 680 F.2d 695; *United States v. Callahan*, 588 F.2d 1078, 1085 (10th Cir. 1979), *cert. denied*, 444 U.S. 826; *Smith v. United States*, 305, F.2d 197 (9th Cir. 1962); *Oertle v. United States*, 370 F.2d 719, 727 (10th Cir. 1966), *cert. denied* 387 U.S. 943.

[5]*See*, for example, *United States v. Winter*, 663 F.2d 1120, 1146-49 (1st Cir. 1981); *Black v. United States*, 309 F.2d 331, 343-44 (8th Cir. 1962), cert. denied 372 U.S. 934; *United States v. Burke*, 781 F.2d 1234 (7th Cir. 1985), *overruling United States v. Donnelly*, 179 F.2d 227, 233 (7th Cir. 1950) (which held that a defendant who introduces character evidence is entitled to a "standing alone" instruction).

acceptance of reputation evidence as a means of proving human character. However, when the only pronouncements of this Court on the subject are so equivocal that four different meanings are assigned to them, it is clear that a definitive ruling by this Honorable Court is needed.

3. The constitutional guarantees of due process and reasonably effective assistance of counsel require that counsel know in advance of summation how a jury will be instructed on the law.

Given the exchange between counsel and the trial judge in this case regarding the defense's most critical instruction, the Third Circuit has made a mockery of these constitutional guarantees in holding that counsel had no reason to believe he would get his requested instruction because the trial judge "did not specifically agree to charge in the precise language which was requested."

Has the law evolved to the point where counsel cannot believe the word of a federal judge in the most straightforward context imaginable? Must counsel require that a judge initial each word of a requested instruction just to be sure the instruction will be given? Is there no duty on the part of a federal judge to clarify an unambiguous response if he intended the opposite meaning, particularly where his response concerns a critical state of a criminal proceeding?

This Honorable Court, in its supervisory capacity, should impose such a duty on federal judges, if one does not already exists by necessary implication. Otherwise, instruction conferences might as well be dispensed with as charades which neither assist counsel in preparing effective summations nor commit the judge to giving the instructions any reasonable person would believe he planned to give, based upon his responses to specific questions regarding the same.

4. Except for the miniscule percentage of federal criminal bench trials, every other federal criminal case that is tried depends upon the instructions given the jury. Moreover, the very right to effective assistance of counsel in those trials assumes that counsel knows what those instructions will be. Thus, to allow Rule 30 conferences to be reduced to a game of "weasel words" (i.e. words that sound like one thing but are secretly intended to authorize the opposite) is to allow the Sixth Amendment itself to be emasculated.

5. Similarly, as the use of reputation evidence has become increasingly widespread in criminal jury trials, the number of defendants and defense counsel affected by rulings on the subject has grown exponentially. Since the root of those rulings are directly traceable to this Court's pronouncements, further refrainment from a definitive ruling by this Honorable Court leaves both the federal courts and the affected defendants at the mercy of a virtual casino of possibilities with constantly changing odds.

6. The cumulative effect of the above-stated reasons makes this an ideal case for clarifying the issues presented. The adjudicative facts are clear and uncomplicated; the issues are ripe for decision; the previous rulings of this Honorable Court are what gave rise to the issues; there is a multi-faceted circuit conflict as to their proper resolution; the number of persons affected is substantial; and the rights involved go the very heart of the constitutional guarantees that attend the criminal justice system in this country.

CONCLUSION

This Honorable Court should grant the instant Petition and resolve the continuing circuit conflict created by this Court's previous pronouncements on the use of reputation evidence It should also grant the Petition in order to declare the duty of federal judges to clarify their intentions respecting requested instructions.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 87-1452 and 87-1467

UNITED STATES OF AMERICA

v.

SPANGLER, EDWARD
Appellant in No. 87-1452

MAIRONE, ANTHONY
Appellant in No. 87-1467

On Appeal from the United States District
Court For the Eastern District
of Pennsylvania
(Criminal No. 87-54)

Submitted Under Third Circuit Rule 12(6)
January 19, 1988
Before: GIBBONS, *Chief Judge*,
WEIS and GREENBERG, *Circuit Judges*

(Filed January 29, 1988)

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OPINION OF THE COURT

GIBBONS, *Chief Judge:*

Edward Spangler, a Philadelphia Police Lieutenant, and Anthony Mairone, a police officer, both employed during the relevant time period as members of the East Division vice squad, appeal from judgments of sentence imposed following their conviction by a jury of extortion, conspiracy to commit extortion, and aiding and abetting the crime of extortion. 18 U.S.C. § 1951 (1982); 18 U.S.C. § 2. Each contends that the trial court erred in failing to give a requested instruction on evidence of his good character, and in choosing the wording of the instruction on good character which was given.

The government's case consisted of the testimony of Andy Kelly, a police officer who worked as Mairone's partner in

the vice squad, and the testimony of approximately 10 numbers writers and one sports betting operator. From that testimony the jury could reasonably conclude that the numbers operators and the sports betting operator regularly made protection payments to Kelly or Mairone, and that these payments were divided among Spangler, Kelly, and Mairone.

Spangler testified on his own behalf. Mairone elected not to testify. Each presented various witnesses who testified to his character or reputation as a good, honest, law-abiding citizen. Both defendants requested a specific instruction:

> Evidence of good reputation in and of itself can create a reasonable doubt.

The trial court indicated that it would include in the jury charge "the character witness instruction," but did not specifically agree to charge in the precise language which was requested. The court instructed on character evidence as follows:

> Now, you did hear some, some people call it character evidence, reputation evidence.
>
> You heard a number of character witnesses, each of whom, some of whom, lets put it that way, I think, stated their personal opinion, as well as the reputation of the defendant in the community for honesty and being a law abiding citizen and the law says, you should consider such character evidence along with all the other evidence you heard in the case when making your determination as to whether the government has proved, beyond a reasonable doubt, that the defendant whose case you are then considering, committed the particular crime or crimes that are alleged in the indictment.

Relying particularly on *United States v. Logan*, 717 F.2d 84 (3d Cir. 1983) Spangler and Mairone contend that the failure

to at least include in the instruction the requested language that evidence of good reputation in and of itself can create a reasonable doubt, was an error which requires a new trial. In *Logan*, the opinion reviewed this court's caselaw on the character evidence instruction. That caselaw starts with a pronouncement in *Kaufmann v. United States*, 282 F. 776, 785 (3d Cir.), *cert. denied*, 260 U.S. 735 (1922), that "the defendant was not entitled to have the judge charge that his good reputation, standing alone, of itself, without regard to the other evidence or circumstances in this case, was sufficient to create reasonable doubt." Two decades later, in *United States v. Quick*, 128 F.2d 832, 835 (3d Cir. 1942) the Court stated that jurors should be instructed:

> . . . that they should consider the character evidence along with all of the other evidence in the case and that, when all of the evidence has been considered, if a reasonable doubt as to the defendant's guilt then existed, it was their duty to acquit. . . .

See also United States v. Klass, 166 F.2d 373 (3d Cir. 1948 (in banc); *United States v. Frischling*, 160 F.2d 370 (3d Cir. 1974). None of these cases required that the district court give, when requested, a "standing alone" charge such as the one *Kaufmann* said it might properly reject.

In *United States v. Baysek*, 212 F.2d 446, 447-48 (3d Cir.), *cert. denied*, 348 U.S. 836 (1954), the district judge charged the jury that character evidence "of itself" or "alone" may raise a reasonable doubt but then stated, "If, however, you are satisfied the Defendant is guilty, you should convict him, notwithstanding proof of good character." In affirming the conviction, Judge Maris explained that this last sentence did not undo the "very full and fair statement of the duty of the jury to consider the character evidence with the other evidence in the case and to acquit the defendant if the character evi-

dence, either alone or considered with other evidence, raised a reasonable doubt of his guilt." 212 F.2d at 448. While the *Baysek* decision approved a "standing alone" charge, it certainly did not require one. *But see Logan*, 717 F.2d at 90 n.11 (quoting Judge Maris' description of the district court's charge as a holding that such a charge is required) (dictum). Instead, "all that was required" was that the jury "must have understood that if after consideration of all the evidence, including the character evidence, they were satisfied beyond a reasonable doubt of the defendant's guilt they should convict him even though he offered evidence of good character." 212 F.2d at 448.

The *Logan* holding is consistent with these earlier decisions. The court ordered a new trial in *Logan* because of the total omission of a character evidence instruction. Thus the holding is of no help to Spangler and Mairone. They rely instead on dicta in *Logan* recommending a character evidence instruction suggested in Devitt & Blackmar, *Federal Jury Practice and Instructions* § 15.25 (3d ed. 1977); 717 F.2d at 92. The suggested instruction was not the "standing alone" charge which Spangler and Mairone requested. A simplified version now appears in the 1987 Cumulative Supplement of Devitt and Blackmar, *Federal Jury Practice and Instructions* § 15.25. That simplified version provides in full:

> You have heard testimony that the defendant, ____, (has a good reputation for [e.g., honesty] in the community where he lives and works) (in his opinion, is an [honest] person). Along with all the other evidence you have heard, you may take into consideration what you believe about the defendant's [honesty] when you decide whether the government has proved, beyond a reasonable doubt, that the defendant committed the crime.

The commentary notes that "[l]anguage suggesting that character evidence alone can create a reasonable doubt was disapproved in *United States v. Burke*, 781 F.2d 1234 (7th Cir. 1985), citing cases from several circuits."

We hold that so long as an instruction consistent with *Quick*, *Frischling* and *Baysek* is given, which calls the jury's attention to its duty to take character evidence into account with all of the other evidence in deciding whether the government has proved its charge beyond a reasonable doubt, the omission of the express "standing alone" language which was requested here is not an abuse of the discretion vested in the trial court to choose the wording of the character evidence charge. The court's instruction satisfied the *Quick*, *Frischling*, *Baysek* standard. Thus the defendants' new trial motions were properly denied.

Spangler urges, however, that a new trial should be granted because the court promised a "standing alone" charge and thereby misled his attorney with respect to appropriate closing argument. We find no such promise in the record. Even if the record supported the contention the outcome would be no different, for there is no significant difference between counsel's argument and the court's instruction. Obviously counsel was free to place greater emphasis on the significance of the character evidence than did the trial judge.

Mairone contends that he received ineffective assistance of counsel because his attorney failed to request a more specific character evidence instruction. We do not ordinarily consider an ineffective assistance of counsel contention on direct appeal. *United States v. Sturm*, 671 F.2d 749 (3d Cir.) *cert. denied*, 459 U.S. 842 (1982). We note however, that a collateral attack on the judgment of sentence in Mairone's case can hardly succeed with respect to the character evidence in-

struction in light of our holding that the instruction satisfied the caselaw governing in this circuit.

The judgments appealed from will, therefore, be affirmed.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit